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No. 98-241

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In The

Supreme Court of the United States

October Term, 1998

MICHAEL C. BRICKHOUSE,

Petitioner,

vs.

JONATHAN CORPORATION, and DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF IN OPPOSITION FOR RESPONDENT JONATHAN CORPORATION

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QUESTION PRESENTED

Did the United States Court of Appeals for the Fourth Circuit err in determining that Petitioner was not injured on a covered situs for purposes of jurisdiction under the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. § 903(a) where Petitioner's injury occurred in a steel fabrication plant which was not an "other adjoining area" the "*raison d'etre*" of which is its use in connection with navigable waters?

PARTIES TO THE PROCEEDING

The Respondent has no parent companies and no nonwholly owned subsidiaries.

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STATEMENT OF THE CASE

This matter involves a claim for workers' compensation benefits under the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. § 901, *et seq.* (hereinafter "LHWCA" or the "Act"). The matter was heard before Administrative Law Judge Daniel A. Sarno, Jr., of the United States Department of Labor, to determine whether there was jurisdiction under the LHWCA with respect to the injuries suffered by Petitioner, Michael C. Brickhouse (hereinafter "Brickhouse" or "Petitioner").

Petitioner began working for Tidewater Steel (a division of Jonathan Corporation) as a welder in 1988. Tidewater Steel's main function is heavy steel construction. It bids on jobs from any kind of contractor and also does steel fabrication work for the Jonathan Corporation.

Tidewater Steel's plant is located in Chesapeake, Virginia. There is a railroad track at the front of the property as well as a road. At the back of the property is the Elizabeth River. The facility is located near a residential neighborhood, Social Services Office and a school, as well as a Virginia Power facility. According to the physical survey of the Tidewater Steel property, the main portion of the Tidewater Steel building is approximately 1,000 feet from the Elizabeth River. Petitioner was actually injured even farther from the river, approximately 1,400 feet away.

The physical structure at Tidewater Steel is a building approximately 800 feet long and 100 feet wide. This building is divided into three separate bays, which for all practical purposes function as two separate buildings. Bay I is used to fabricate steel for arguably maritime related projects. Bay II and Bay III are used for other non-maritime, heavy steel

fabrication. In addition, there are approximately ninety acres surrounding the building which are used for storage unrelated to maritime construction.

Most of the steel that is fabricated at Tidewater Steel is brought to the facility by railroad. Lighter pieces of steel are brought in by truck. Barges and the waterways are *never* used to receive steel into the plant. The railroad line that is used to bring the steel to the facility actually comes directly into the building, all the way through the two bays that are used for non-maritime construction. All of the products are shipped out by rail or truck, except for the very largest items which are, occasionally, sent by barge. There is no crane on the property for loading and unloading barges.

Petitioner was employed as a welder. The vast majority of his work was on bridge construction. Very occasionally, Petitioner worked on steel fabrication for Jonathan's projects.

On August 14, 1993, Petitioner was working in Bay III, welding a piece of steel. He was using a crane to hold up the large piece of steel. Another welder needed to use the crane, and disconnected it from Petitioner's piece. When Petitioner returned to work on the piece of steel, it fell on him.

On the date that he was injured, Petitioner was working on steel construction for a railroad bridge. (Jt. App. 36). The construction, when completed, was to be shipped out by rail. (Jt. App. 36).

The claim was heard before Administrative Law Judge Daniel A. Sarno who found that the Petitioner had satisfied the situs and status requirements for establishing jurisdiction under the LHWCA, and awarded benefits. Jonathan then appealed this decision to the Benefits Review Board which affirmed the Decision of the Administrative Law Judge.

Jonathan then requested review before the United States Court of Appeals for the Fourth Circuit. The Fourth Circuit reversed, relying on its earlier decision in *Sidwell v. Express Container Services*, 71 F.3d 1134 (4th Cir. 1995), *cert. denied*, 518 U.S. 1028 (1996). The court found that the fact that the Elizabeth River ran contiguous to the plant's property did not satisfy the situs requirement, as "the steel fabrication plant where Brickhouse was injured was not a facility, the '*raison d'etre* of which is its use in connection' with the nearby navigable waters." (App. 19, citing *Sidwell* at 1139). The court stated:

> The plant was not connected to the Elizabeth River in any way necessary to make workers in the plant longshoreman working at the water's edge. Indeed, the plant was almost 1,000 feet from the water's edge, and it was not "customary" for the plant's workers to move between land and water in any regular way. They remained in the plant fabricating maritime and non-maritime components, just as they would have done if the plant were located at any inland site.

(App. 18-19).

Because the Court concluded that Petitioner was not injured on a covered situs, they did not address his "status", that is, "the more complex question of whether Brickhouse was injured while engaging in maritime employment." (App. 19-20).

REASONS FOR DENYING THE WRIT

I.

THE PETITION FOR WRIT OF CERTIORARI EXAGGERATES THE CONFLICT BETWEEN THE CIRCUITS.

The Petitioner correctly points out that a number of circuits have considered the situs aspect of jurisdiction under the Longshore and Harbor Workers' Compensation Act. However, the tests utilized by the various circuits are not as different as the Petitioner suggests and, it is submitted, the differences that do exist do not amount to a matter of national significance.

The crux of the dispute centers on the 1972 amendments to the LHWCA and the "situs" requirement for jurisdiction under the Act. Assuming that an injured employee has requisite maritime "status," as defined in 33 U.S.C. § 902(3), jurisdiction will only attach when the injury occurs on a specific "situs." The Act limits coverage to:

> [a]ny injury occurring upon the navigable waters of the United States (including any adjoining pier, wharf, drydock, terminal, building way, marine railway, or *other adjoining area customarily used by an employer in loading, unloading, repairing, dismantling, or building a vessel*).

33 U.S.C. § 903(a). (emphasis added). Because the injury to the Petitioner herein, and the other cases cited, did not occur upon navigable waters or one of the enumerated areas, the question revolves around the limits of the phrase "other adjoining area customarily used by an employer in loading, unloading, repairing, dismantling, or building a vessel."

In recent years, "other adjoining area" situs has been addressed by many of the circuit courts. In *Brady-Hamilton Stevedore Co. v. Herron*, 568 F.2d 137 (9th Cir. 1978), the Ninth Circuit held that:

> In order to further Congress' goal of uniform coverage, the phrase "adjoining area" should be read to describe a *functional relationship* that does not, in all cases, depend upon physical contiguity. Consideration should be given to the following facts, among others, in determining whether or not a site is an "adjoining area" under § 903(a): the particular suitability of the site for the maritime uses referred to in the statute; whether adjoining properties are devoted primarily to use in maritime commerce; the proximity of the site to the waterway; and whether the site is as close to the waterway as is feasible given all of the circumstances in the case.

Id. at 141 (emphasis added).

In *Texports Stevedore Co. v. Winchester*, 632 F.2d 504 (5th Cir. 1980), *cert. denied*, 452 U.S. 905 (1981), an *en banc* Fifth Circuit utilized a less specific "totality of the circumstances" test:

> All circumstances must be examined. Nevertheless, outer limits of the maritime area will not be extended to extremes.

Id. at 514. In further defining "adjoining area," that court noted that "[s]o long as the site is close to or in the vicinity of navigable waters, or in a neighboring area, employee's injury can come within the LHWCA." *Id.* Further, "[t]he perimeter of an area is defined by function. The 'area' must be one

customarily used by an employer in loading, unloading, repairing or building a vessel." *Id.* at 515. The court went on to examine the facts of the particular case and looked to factors very similar to the ones enumerated by the Ninth Circuit:

> [I]n this case, the . . . gear room was not clearly outside the waterfront area customarily used by employers for gear rooms. . . . The ALJ found that the gear room operations were part of the ongoing, overall loading process . . . He found that the gear room was "in the most desirable position for servicing the docks" . . . and that the gear rooms of most stevedores were not on the docks proper. . . . The gear room was as close to the dock as was feasible. . . . Not only does the area **adjoin the navigable waterway**, but the gear room itself has a sufficient nexus to the waterfront.

Id. at 515 (emphasis added).

In *Triguero v. Consolidated Rail Corp.*, 932 F.2d 95 (2d Cir. 1991), a panel of the Second Circuit utilized a very similar test for "other adjoining area" situs. The *Triguero* court cited the *Brady-Hamilton* test with approval and also looked to whether the situs of the injury was "an integral part of the shipyard despite the distance of the situs from the waterway." *Id.* at 100-101. Thus, the Second Circuit essentially adopted the *Brady-Hamilton* "functional" approach.

In *Brooker v. Durocher Dock & Dredge,* 133 F.3d 1390 (11th Cir. 1998), *cert. granted,* 67 USLW 3097 (September 29, 1998), the Eleventh Circuit denied jurisdiction in a case where the claimant was injured during the construction of a seawall, despite the fact that a seawall was in and of itself the "boundary between land and navigable waters." The court held

that the seawall was not a "pier" as defined by Section 3(a) of the LHWCA and, additionally but almost tangentially, was not an "other adjoining area" as it was "not a place of traditional maritime activity." *Id.* at 1394.[1]

In *Nelson v. American Dredging Co.*, 143 F.3d 789 (3d Cir. 1998), the Third Circuit was asked to determine whether a bulldozer operator working on a beach reclamation project was covered under the LHWCA. The beach reclamation project was on the shores of the Atlantic Ocean, and therefore clearly adjoined a navigable waterway. What was at issue, as in the present case, was whether the injury occurred in an adjoining area which was "customarily used by an employer in loading, unloading, repairing, dismantling or building a vessel." The court ultimately determined that the claimant had, in fact, been injured under a covered situs but, more importantly for the purposes of this matter, utilized both a geographic and functional approach in requiring that the beach be customarily used for traditional maritime activity in order to meet the "other adjoining area" situs requirement. *Id.* at 796-797.

The Fourth Circuit also adopted an "other adjoining area" situs test which examines function and location. *Sidwell v. Express Container Services*, 71 F.3d 1134 (4th Cir. 1995), *cert. denied*, 518 U.S. 1028 (1996). The *Sidwell* court examined the plain meaning of the statute and found that, as to "adjoining"

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1. This Court's grant of certiorari in *Brooker* would, at first blush, appear to argue for similar consideration herein, as both cases do involve situs and an interpretation of Section 3(a). However, the Eleventh Circuit's primary focus in that decision was whether a seawall was a "pier," a narrow matter not at issue herein. The discussion of whether the place of injury was an "other adjoining area" was almost an afterthought, without detailed analysis. It's resolution should not affect the rationale of the instant matter involving an injury to a steel fabrication worker 1000 feet from the water's edge.

navigable waters, the area must be contiguous or otherwise touch such waters. While that language may at first glance appear more restrictive than the other circuits' formulations, the differences are not significant. The Fourth Circuit took care to point out that

> it is the parcel of land that must adjoin navigable waters, not the particular square foot on that parcel upon which a plaintiff is injured. . . . the physical distance is not decisive. . . . The test is whether the situs is within a contiguous shipbuilding area which adjoins the water.

Sidwell, 71 F.3d at 1140, n.11, quoting *Alabama Drydock & Shipbuilding Co. v. Kininess*, 554 F.2d 176, 178 (5th Cir. 1977), *cert. denied*, 434 U.S. 903 (1977).

Having determined the meaning of adjoining, the *Sidwell* court instructed that "other" and "area" must be defined with reference to the preceding language of qualification. Therefore, an "other adjoining area", as to which coverage extends, must be *like* a pier, wharf, drydock, terminal, building way, or marine railway; that is, a discrete shoreside structure or facility. *Id.* Finally, the area must be customarily used by an employer in loading, unloading, repairing, dismantling, or building a vessel, that is an area the "very *raison d'etre* is its use in connection with navigable waters." *Sidwell* at 1139.

The Fourth Circuit Court of Appeals revisited the "other adjoining area" situs question in the present matter. At issue in this case is not the contiguity of navigable water, but the function or the "nature" of the adjoining area. (App. 16). The *Brickhouse* court noted that the "controlling principles" on this issue were laid down in *Sidwell*. (App. 16).

Addressing those principles in more detail, the *Brickhouse* court stated:

> The landward extension [of LHWCA jurisdiction] is a seamless annexation of land to navigable waters for purposes of LHWCA coverage. But the annexation does not include all adjacent land. The statute *extends 'navigable waters' only to land relating to work on those waters*, specifically enumerating adjoining piers, wharfs, dry docks, terminals, building ways and marine railways. These are facilities customarily used by longshoreman in loading and unloading ships and in repairing or building them. The link between the navigable waters and the land side facilities is thus established under the statute by (1) *the contiguity of the land side facility and navigable water*, and (2) *the affinity of the landside facility to longshoreman's work on ships.*
>
> Anticipating that its enumeration of landside facilities might not be complete, Congress also incorporated a catchall term in § 903(a) to include any 'other adjoining area customarily used by an employer in loading, unloading, repairing, dismantling, or building a vessel.' But again, Congress did not abandon its legislating principle of connecting this 'other area' to the work of longshoremen on navigable waters. The 'other area' annexed to navigable waters of the Act must again be 'adjoining' the water and must again be linked to the traditional longshoremen's work on the water. The 'other area' must be for the *loading or unloading of cargo* onto ships in navigable waters

> or for the '*repairing, dismantling, or building' of those ships.*

(App. 14-15), (citations omitted) (emphasis added).

The Fourth Circuit then applied the law to the facts of the present matter. The court determined that Petitioner was fabricating steel parts in a steel fabrication plant which was not a pier, wharf, dry dock, terminal, building way or marine railway. Further, it was not a similar type of facility that "fits the catch all provision." The court found the following facts to be important in its determination that the Tidewater Steel facility was not an "other adjoining area" "customarily used by an employer in loading, unloading, repairing, dismantling or building a vessel":

> While at the plant, *the employees' work did not routinely take them from within the plant, onto adjoining water, and back again into the plant.* On the contrary, when at the plant, their work kept them in the plant to fabricate steel components that were shipped from the plant, usually by rail or truck, either to an inland sight or to a ship on navigable waters for installation. *The very fact that it was necessary for the components to be shipped from the plant before their installation, whether by ship or not, provides the fact that insulates the plant from navigable waters and distinguishes Brickhouse's work location from that of a traditional longshoreman's workplace at the water's edge.* When Brickhouse worked on ships, which he occasionally did, he traveled by land to the shipyard where he then installed the fabricated parts. During these times, he was undoubtedly on a situs covered by the LHWCA. *But while at the Tidewater Steel*

> *plant, his situs was no different than it would have been at any steel fabrication plant anywhere in the land.*

(App. 17-18). (emphasis added).

Thus, although the Tidewater Steel facility was located on the shores of the Elizabeth River, that fact was not determinative of situs. **Nor would that fact have determined situs in any other circuit in the nation.** Petitioner correctly points out that the Third Circuit in *Nelson, supra,* disagreed with the *Sidwell* definition of "area," however, that definition is not the issue in the present matter. Here, the Fourth Circuit looked to the "nature" of the situs in question, that is, whether it is "customarily used by an employer in loading, unloading, repairing or building a vessel." The circuits that have examined the issue, as outlined above, have required the adjoining area to have the appropriate *function* in order to establish situs. The adjoining area must be "customarily used by an employer in loading, unloading, repairing, dismantling or building a vessel." *Brady-Hamilton* at 141; *Textports* at 515; *Triguero* at 100-101; *Brooker* at 1394, *Nelson* at 796-797.[2]

On that point, the *Nelson* court agreed with the *Sidwell* and *Brickhouse* interpretation of the Act. The beach in *Nelson* had to be used for a traditional maritime activity, just as the steel fabrication plant did, in order to have the requisite situs.

In addition, it should be noted that the very factors which the Petitioner argues show that the Fourth Circuit rule is "harsh"

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2. The First and Sixth Circuits have addressed the issue only briefly in their decisions. *See Stockman v. John T. Clark & Son*, 539 F.2d 264 (1st Cir. 1976), *cert. denied*, 433 U.S. 908 (1977); *Rizzi v. Underwater Construction Corp.*, 84 F.2d 199 (6th Cir. 1996), *cert. denied*, 117 S. Ct. 302 (1996).

and "rigid" (see Petitioner's Brief at 15-16) are similar to the factors considered by the Ninth Circuit Court of Appeals in *Brady-Hamilton* and by the Fifth Circuit in *Textports*: suitability, proximity and feasibility to maritime use.

Thus, like the Second, Third, Fifth, Ninth and Eleventh Circuits, the Fourth Circuit situs test examines function, as well as location. While the Fourth Circuit perhaps creates a clearer line than that set forth by other circuits, the situs test does not subject longshoremen in Virginia to an intolerably different scope of coverage than longshoremen in Louisiana, California or New York.

Additionally, this identical issue — whether the Fourth Circuit's decision in *Sidwell* created a split in the circuits — was litigated in *Sidwell* itself and answered with a denial of certiorari by this Court. *Sidwell, cert. denied,* 518 U.S. 1028 (1996). The instant matter is directly derivative of the *Sidwell* rationale and, with minor exceptions, the national "situs" landscape remains the same. Petitioner points to no rash of claim denials or demands by the lower courts for uniformity since the denial of certiorari in *Sidwell* and it is thus evident that the fine distinctions noted do not rise to the level of national importance.

II.

THE DECISION OF THE FOURTH CIRCUIT IN THIS CASE IS CONSISTENT WITH PRIOR DECISIONS OF OTHER PANELS OF THE COURT OF APPEALS FOR THE FOURTH CIRCUIT.

Prior to *Sidwell* and *Brickhouse*, the Fourth Circuit had considered "other adjoining area" situs in two cases, without ever developing a comprehensive test. *Newport News Shipbuilding & Drydock Company v. Graham*, 573 F.2d 167

(4th Cir. 1978), *cert. denied*, 439 U.S. 979 (1978); *Humphries v. Director, Office of Workers' Compensation Programs*, 834 F.2d 372 (4th Cir. 1987), *cert. denied*, 485 U.S. 1028 (1988). In *Sidwell*, the Fourth Circuit acknowledged these prior decisions, noted the lack of a "touchstone for all future LHWCA jurisdictional questions" and declared, "we now decide how it should be determined in this circuit whether the situs requirement of the LHWCA is satisfied." *Sidwell*, 71 F.3d at 1138.

Similarly, the *Brickhouse* court referred to the *Humphries* case specifically, and noted that it was "consistent" with the principles established by the present matter. (App. 16).

Thus, the Fourth Circuit itself has addressed whether its prior decisions were determinative of the situs issue and decided they were not. An analysis of *Graham* and *Humphries* confirms that, prior to *Sidwell*, there was no comprehensive situs test in the Fourth Circuit. *Graham* contains a brief, one paragraph discussion of the issue. The *Graham* court found that two sites, a submarine shop and a foundry, 120 and 3,000 feet from the water's edge satisfied the situs test because they were an "integral part" of the shipyard. *Graham*, 573 F.2d at 169.

In *Humphries*, the Fourth Circuit engaged in a much more lengthy discussion of situs and examined the *Brady-Hamilton* and *Texports* approaches. Ultimately, however, the court *expressly declined* to establish a comprehensive test and simply recited a number of factors which resulted in a conclusion that the accident in that case did not occur on a maritime situs. *Id.* at 375. Among the factors considered by the court were that the accident occurred over a mile from the Terminal, along a "public highway which did not connect any portions of [the employer's] operations or traverse continuous or contiguous terminal areas." *Id.* In addition, the restaurant where the injury

occurred was "separated from the Elizabeth River and the nearest maritime terminal by a residential neighborhood." *Id.*

Thus, contrary to the Petitioner's assertions, the Fourth Circuit's decision in the present matter is not in conflict with its prior decisions.

III.

THE FOURTH CIRCUIT'S INTERPRETATION OF THE LHWCA IS IN ACCORDANCE WITH THIS COURT'S DECISIONS.

Petitioner's argument that the Fourth Circuit has failed to construe the LHWCA in accordance with this Court's established principles is without merit. In *Estate of Cowart v. Nicklos Drilling Co.*, 505 U.S. 469 (1992), this Court directed that, in a statutory construction case, "[t]he controlling principle . . . is the basic and unexceptional rule that courts must give effect to the clear meaning of statutes as written." *Id.* at 476.

The Fourth Circuit, in both *Brickhouse* and *Sidwell,* has followed this directive and adhered to the plain language of the Act in making its situs determinations.

Moreover, the Fourth Circuit has not failed to "liberally construe" the Act, as Petitioner asserts, but has consistently followed the plain language of the Act, keeping the burden of proof where it is supposed to be, on the claimant, as established by this Court's decision in *Director, Office of Workers' Compensation Programs v. Greenwich Collieries*, 512 U.S. 267, 280-286 (1994).

CONCLUSION

For all the foregoing reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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